STATEMENT OF

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BEFORE THE

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE'S
SUBCOMMITTEE ON HIGHWAYS, TRANSIT, AND PIPELINES

UNITED STATES HOUSE OF REPRESENTATIVES

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HAZARDOUS MATERIALS ENDORSEMENT
BACKGROUND CHECKS

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Mr. Chairman and Members of the Subcommittee:

My name is Scott Madar, and I am the Assistant Director of the Safety and Health Department of the International Brotherhood of Teamsters. Thank you for the opportunity to testify today on behalf of our 1.4 million members regarding such an important issue: the Background Check Requirements for Commercial Drivers with Hazardous Materials Endorsements. The Teamsters Union represents hundreds of thousands of drivers who make their living driving on our nation's roads, from interstate highways to city streets, oftentimes carrying hazardous materials.

As a general matter, the International Brotherhood of Teamsters recognizes that in the post 9/11 world, there is clearly a need to strengthen security in the United States and in particular in the nation's transportation system. However, the Teamsters Union continues to question the efficacy of the current criminal component of the background checks of commercial drivers with hazardous materials endorsements as a means to prevent terrorism. With that being said, the Teamsters have accepted that these background checks are part of the government's efforts to make the nation more secure. We recognize that conducting security threat assessments across the transportation network is part of the Federal Government's responsibility, and are therefore making every effort to ensure that the system balances the needs for a safe and secure industry with the rights of drivers to hold good jobs.

While the Teamsters appreciate the attempts of the Transportation Security Administration (TSA) to balance security with the rights of drivers, the Teamsters Union continues to believe that the process could be improved to root out true risks, provide a level of fairness and due process for affected workers, ensure privacy rights, provide for

timely processing of applications and threat assessments, and ensure that workers are not unfairly kept from their chosen profession. I will detail some of these recommendations below.

Loss of HME = Loss of Work:

Section 1012 of the USA PATRIOT Act directed States not to issue licenses to individuals to transport hazardous materials unless a background check of the individual has been conducted and the Department of Transportation has determined on the basis of the background check that the person does not pose a security threat. The hazmat "license" referred to in the statute is actually an endorsement on the individual's commercial driver's license (CDL) which permits that driver to transport hazardous materials. A hazmat endorsement (HME) is necessary for any driver to transport a shipment of any amount of hazardous material that requires placarding.

It is important to point out that although a hazmat endorsement is not technically required for a driver to possess a CDL, from a practical standpoint it is usually necessary for professional truck drivers to have such an endorsement. The vast majority of drivers do not exclusively transport hazardous materials or non-hazardous materials. Particularly in the less-than-truckload (LTL) sector, any given shipment may contain a placardable amount of hazardous materials. For this reason, LTL carriers generally require, as a condition of employment, that their drivers have HMEs. Thus, the loss of an endorsement will in most, if not all, cases have the same effect as a total loss of the CDL for a driver employed in the LTL industry.

Because of the negative impact the loss of an HME has on a driver's ability to work, it is imperative that the process be made as fair as possible.

Disqualifying Offenses:

The list of disqualifying offenses must be improved. The December 2004 Interim Final Rule published by the TSA continues to disqualify drivers from possessing an HME for a variety of offenses, some of which have little or no relation to whether the person poses a national security threat. The list of disqualifying offenses should be better defined to include only those offenses that have a consistent and direct link to national security.

In the preamble to the December 2004 Rule, the TSA stated that the crimes listed in §1572.103 indicate an "individual's predisposition to engage in violent or deceptive activity that may reasonably give rise to a security threat." [69 Fed Reg. 68723]. The TSA indicated that it was attempting to model this list of disqualifying crimes on the Maritime Transportation Security Act (MTSA). However, the MTSA requires disqualification only for felonies that could cause "the individual to be a terrorism security risk …" [Section 70105(c)(1)(A)(i)]. The Teamsters Union contends that the list of crimes adopted in the December 2004 Interim Final Rule do not meet these criteria. The list is overly broad and should be revised to better reflect those crimes that are more closely related to terrorism risks, or threats to national security.

The inconsistencies cited above are especially problematic because some of the offenses included in the Interim Final Rule are not related to whether a person poses a true security risk. For example, any felony involving "[d]ishonesty, fraud, or

misrepresentation, including identity fraud" constitutes a disqualifying offense. This is an extremely broad and somewhat vague description of crimes. The types of offenses covered could include writing bad checks, perpetrating insurance fraud, or other similar offenses. While certainly not admirable, such crimes do not in any way indicate a propensity towards terrorism. In addition, certain dishonesty-based offenses could constitute a felony in one State but not another. If there are specific fraud type crimes that concern the TSA, such as forging passports, immigration papers, or other identity documents, these offenses should be specifically enumerated rather than included in a broad category of fraud offenses. By listing specific crimes instead of broad categories of offenses, the TSA can more narrowly tailor the Rule to better serve the purpose of preventing terrorism, and also help ensure more equal enforcement between the various States. While none of the listed crimes can be condoned (and workers, like all individuals, should and do pay an appropriate criminal penalty) many do not demonstrate a propensity to commit a terrorist or security attack, and the TSA has offered no evidence to the contrary.

The TSA has recognized that "individuals may participate in criminal acts and subsequently become valuable members of the workforce." [68 Fed. Reg. 23861]. We have previously advised the TSA that the ability to obtain productive employment upon release from prison can often play an integral role in the ability of a released convict to remain rehabilitated. In this regard, many corrections departments have rehabilitation programs that steer former prisoners toward the trucking industry. Many trucking companies participate in such programs and will be harmed by the loss of employees if this list of disqualifying crimes is not amended. As discussed above, the loss of an HME

will in many, if not most, cases have the same effect as a total loss of the CDL for a driver employed in the less-than-truckload industry.

Indictment:

Despite the objections of the Teamsters Union, the December 2004 Interim Final Rule continues to disqualify drivers who have been merely accused of an offense, even if they have not yet been convicted. Not only is a person disqualified from possessing an HME if convicted of a listed offense, but under the Rule having a want, warrant or indictment for one of the offenses is also a basis for disqualification. An indictment can often be obtained with little hard evidence and certainly less evidence than is needed for a conviction. To deprive a person of the ability to earn a living under these circumstances is improper and contrary to due process.

Both the aviation background checks and the MTSA require exclusion for felony convictions only. It is patently unfair for the Federal Government to essentially exclude someone from employment because that person has allegedly committed an offense. More importantly, as the Rule is written, it appears that a basic tenet of this country's legal system, innocent until proven guilty, would not apply to commercial drivers who apply for an HME. If disqualification based on an indictment alone were to be permitted, it should only be in the most extenuating circumstances and should be limited to the crimes most likely to be linked to a security threat, such as terrorism, treason, and espionage.

This provision of the Rule effectively extends the period of time that a person is disqualified from holding an HME beyond the periods stipulated in the Rule. An

individual would be disqualified from holding an HME during the period of his/her indictment, and then for another seven years after being released from prison (if convicted). Someone could be under indictment for years before acquittal. During this time, that individual would not be able to hold an HME and could very well be unfairly forced out of a job. If convicted of a crime, we question how the time requirements would apply. As in the above example, if someone is under indictment for two years and then convicted, the regulations would bar that person from holding a hazmat endorsement for nine years (instead of seven) from the date of conviction. If this is the case, then the Rule would serve to extend the period during which an individual would be barred from holding an HME for slow prosecution -- not for a genuine security reason.

Characterization of Offenses:

Despite the Teamsters' objections, the December 2004 Interim Final Rule continues to lack any mechanism for a person to challenge the assertion that a particular crime constitutes a disqualifying offense. This is particularly a problem with the broader offenses. Thus, the problem may be partly resolved if the list of disqualifying crimes is revised to include more specific offenses. Nevertheless, because criminal codes can vary greatly from State to State, as the Interim Final Rule is currently written, there may be circumstances where a person is convicted of an offense that seems to constitute a disqualifying offense but was not necessarily intended by TSA to be one. The Teamsters Union continues to urge for language granting drivers the ability to challenge the characterization of a particular offense either in the appeal or waiver process.

Appeal and Waiver Process:

The Teamsters Union is pleased that the TSA adopted a waiver process and we consider it an essential element in ensuring that individuals who made mistakes in the past are not unfairly denied employment opportunities in the present. However, we continue to believe that modifications must be made to this process to ensure that it serves its intended and stated purpose. In particular, appeal and waiver decisions should be made by an Administrative Law Judge or some other third party not officially included in the TSA hierarchy. This would allow employees to make their case in front of an impartial decision-maker not bound by political pressure or subject to agency interference. The current process forces workers to appeal to or seek a waiver from the same agency that just determined that they are a security threat. Furthermore, given the political realities of security threat assessment, the TSA may be reluctant to grant appeal or waiver requests to convicted felons. Administrative Law Judge decisions would establish case precedent that would better define what constitutes a security risk. This would bring fairness and consistency to a system that is central to both employee rights and national security. For these reasons, we urge the modification of the appeal and waiver processes to include the independent review of these requests.

We would like to thank Chairman Young for his amendment on the pending DHS Reauthorization Bill to provide workers covered by the Maritime Transportation Security Act the right to appeal a TSA determination to an Administrative Law Judge. It is the opinion of the Teamsters Union that Administrative Law Judges will be more independent than political appointees, and workers will be more likely to get a fair and impartial hearing.

Subjective Determination:

The Teamsters Union has serious concerns over §1572.107 of the Interim Final Rule which allows the subjective denial of a hazmat endorsement if TSA "determines or suspects" the applicant of posing a "threat to national security or to transportation security." This provision further allows denial of hazmat endorsement if an individual has "extensive foreign or domestic criminal convictions" or "a conviction for a serious crime not listed in Section 1572.103." The TSA asserts that it needs to have a "level of discretion to carry out the intent of the USA PATRIOT Act and responsibly assess threats to transportation and the Nation, where the intelligence and threats are so dynamic." [69 Fed. Reg. 68736].

We contend that this section grants the TSA overly broad authority and presents opportunities for abuse because §1572.107 essentially allows TSA to make security threat determinations arbitrarily. We have urged the TSA to strike this provision or, at a minimum, to place restrictions on the use of this provision by specifically citing the criteria to be used to disqualify someone under this section.

Despite the added level of review by the Assistant Secretary required by this section, the Teamsters Union again urges the use of a formal, third-party waiver process as discussed above. The TSA claims that because individual circumstances are taken into account under a determination based on §1572.107, there is no reason for a waiver. [69 Fed. Reg. 68727]. We argue that determinations resulting from subjective decisions, based on broad, ill-defined criteria, should be afforded independent review. Additionally, we urge the establishment of a process using either the Inspector General or possibly an

advisory committee, to carefully monitor the use of this provision to ensure that it is used "cautiously and on the basis of compelling information that can withstand judicial review."

Transportation Security Incident:

We are also concerned that the definition of "transportation security incident" is too broad and could be read to encompass a wide range of offenses that are not indeed security threats. We do recognize that the definition adopted by the TSA tracks the language in the MTSA, namely "a security incident resulting in a significant loss of life, environmental damage, transportation system disruption, or economic disruption in a particular area." Nonetheless, it is incumbent upon the TSA or Congress to further clarify the meaning of this ambiguous definition. In particular, the Teamsters Union notes that the phrases "transportation system disruption" or "economic disruption in a particular area" could arguably be read to include non-violent, yet unlawful, actions that shut down a port or otherwise disrupt a transportation facility. In the preamble to the Rule, it would appear that this is not the intent of the TSA and that the agency is instead attempting to capture the most serious offenses. We urge that this term either be struck from the Rule or further defined in the text of the Rule to accomplish this objective. This is especially important since the TSA has decided to include "transportation security incident" as one of the crimes where no waiver may be granted and there is a permanent bar to an HME.

Time Limits:

The Teamsters Union is concerned that the time limits stipulated in the December 2004 Interim Final Rule are too short. Specifically, each State is now required to notify HME holders at least 60 days prior to the expiration date of their HME. The States must notify the HME holder that he/she may begin the renewal process up to 30 days prior to the HME expiration date. The TSA warns that HME holders should begin the renewal process at least 30 days before expiration, otherwise the background check may not be completed before the expiration date. [69 Fed. Reg. 68732]. The Teamsters Union urges an increase in the notification timeline to at least 90 days. The current notification requirement timeline of 60 days provides insufficient time for the HME holder to complete all aspects of the security threat assessment should there be a need for an appeal or waiver. Remember - these appeal or waiver processes may include a request for releasable materials upon which the Initial Determination was based, as well as a request to correct any inaccurate information that resulted in an unfavorable Initial Determination, all of which will require additional time.

Application Delays:

While we can not speak directly to the difficulties faced by every driver during this initial phase-in of the background checks, we do know that many drivers seeking a new HME are being told that there are long delays, lasting in some cases well over 7 weeks. Additionally, some drivers who are seeking renewals and are not currently subject to the background check requirements are incorrectly being forced by States to submit fingerprints such that a background check could be performed. At this time, it is

impossible to characterize the full extent of the problems and delays faced by applicants seeking renewals; however, it is only a matter of weeks before these problems will likely manifest themselves, as the May 30 deadline fast approaches.

If a hazmat driver's application for a renewal is delayed due to a backlog of other applicants, it is possible that drivers could be unfairly deprived of their ability to work. Since drivers have no control over how long it takes to conduct a background investigation, the Teamsters Union firmly believes that a driver who has timely applied for renewal should not be punished for such delays. Many of the drivers who could be affected have been driving for years without any incident. It would be patently unfair for drivers to lose their livelihood through no fault of their own. Therefore, we recommend that any driver who timely applies for renewal of his/her endorsement should be granted an automatic extension until the State is given notice of a final determination. The Teamsters Union does not believe that an automatic extension is an unreasonable request since every existing commercial driver with an HME has had a name-based background check already performed, and the TSA will continue to include this intelligence-based check as part of the procedures of the security threat assessment described in §1572.15. While we recognize that §1572.13(d) allows States to issue extensions of up to 90 days, it does not appear to be automatically triggered and may remain up to each State to initiate.

The need for an extension is further seen in the case of individuals who do not initially receive a Determination of No Security Threat. Persons who have received an Initial Determination of Threat Assessment are permitted to appeal that determination. However, the appeal process itself (without any extensions) can take up to 90 days. Thus, in instances where there is an initial threat assessment, the driver's existing

endorsement will almost certainly expire before final resolution unless the endorsement is extended pending resolution of the appeal. Although the TSA would be justifiably more concerned about these individuals continuing work after an Initial Determination has been issued, the Interim Final Rule already provides a safeguard for immediate revocation of endorsements under §1572.13(a) in cases where there is evidence of a serious threat. In all other cases, an individual should be permitted to correct any errors before he or she is deprived of the ability to work. Thus, we again request that the Rule be amended to make clear that the validity of an endorsement is automatically extended during any timely filed appeals.

Application to Foreign Drivers:

Another area of concern is how foreign drivers will be treated under the new Rule. The Teamsters Union has asserted previously (Docket No. TSA-2003-14610) that the TSA should be certain to ensure that foreign drivers are subject to equally thorough background investigations and that they are disqualified on the same grounds as U.S. drivers. In addition, a mechanism must exist for U.S. inspectors to determine easily whether foreign drivers are disqualified from transporting hazardous materials pursuant to such disqualification. It would be utterly unconscionable to permit Mexican or Canadian drivers to carry hazardous materials under the same circumstances in which a U.S. driver would be prohibited from doing so. The TSA must strive to achieve one level of security for all drivers - including foreign drivers.

Costs to Drivers:

The Teamsters Union has gone on record (TSA-2004-19605) stating that it does not believe that the drivers should have to bear the cost of these requirements. In the Department of Homeland Security Appropriations Act, Congress intended for the TSA to charge fees to recover the costs associated with performing the credentialing and background checks [P.L. 108-90, Section 520]. However, when this language is examined carefully, it is clear that there is no requirement for drivers alone to bear the brunt of these fees, nor is there a requirement that these fees recover start up and other infrastructure costs. As the Teamsters Union has stated previously, this is a Federal program that already imposes a substantial additional burden on drivers. Drivers should not be required to also sustain the burden of funding the program. The fees imposed should be divided among all affected parties, including the employers and the Federal Government. In other sectors of transportation, the Federal Government has provided security assistance and this sector of transportation should receive the same benefit.

The TSA has indicated in its fee rulemaking that a significant portion of the costs being passed on to the drivers are those associated with the creation and maintenance of databases, disaster recovery, and other infrastructure costs, including over $4.7 million in start up costs. The Teamsters Union contends that these fees should not be passed on to the drivers. These costs should be absorbed by the Federal Government as they should not be considered part of "providing the credential or performing the background record checks." [P.L. 108-90, Section 520] Only those fees associated with collecting information should be passed on to the drivers and employers.

The TSA has also made it clear that these fees will likely go up, as they are scheduled for biennial reviews. "Pursuant to the Chief Financial Officers Act of 1990, DHS/TSA is required to review these fees no less than every two years (31 U.S.C. 3512)." [69 Fed. Reg. 65335, November 10, 2004] and these fees have not been adjusted for inflation [*id.* at 65337]. In addition, there are costs that will be associated with States that choose to get involved in this process by performing the information collection and transmission functions themselves. These States are allowed to charge a fee under their own user fee authority and are responsible for establishing their own State fee to recover the costs of performing these services. Currently, drivers in different States are being charged different amounts to obtain their HME. Lastly, the cost estimates by the TSA do not include the costs associated with the appeals or the waiver process, as any driver who needs to use these procedures undoubtedly would incur additional costs. Therefore, the costs as proposed are likely to underestimate the actual costs being imposed on drivers.

In light of the estimated costs ($72 million) for the implementation of this program, the Teamsters Union questions whether a different program could be established that would achieve the same results in a more efficient and less costly manner. We have suggested that the TSA carefully reevaluate all aspects of this program to determine if the same level of security could be achieved in a more cost effective manner. Any monetary savings that are realized could be used for other security measures. An expenditure of this size addressing another area of security, such as chemical plant security, would protect a larger portion of the population from a terrorist event. (An event involving a breech of chemical plant security has the potential to be

much more devastating than any that could be achieved by a single hazardous material-carrying commercial motor vehicle.)

Duplication of Effort:

The Teamsters Union continues to question why the TSA has not further studied the possibility of combining other programs currently underway within the Department of Homeland Security with the security threat assessment program for hazmat drivers. The TSA indicated that it will consider the consolidation of several programs to improve efficiency while fulfilling security needs. [69 Fed. Reg. 68723].

It seems logical to the Teamsters that all security threat assessment programs should utilize the same, or nearly the same, standards for security threat determinations, as well as the same infrastructure such that the costs associated with these programs (both to the agency responsible for the programs and to the individuals involved) can be minimized. We believe that consolidation of security programs will offset some of the costs associated with this program and minimize any additional fees that will be assessed on the hazmat endorsed drivers as a result of this program. To that end, the Teamsters urge examination of all security threat assessment programs, as well as the infrastructure needed to administer these programs, with the ultimate goal of consolidating as many as possible.

7/5 Year Look-Back Period:

We would again like to thank Chairman Young for his amendment on the pending DHS Reauthorization Bill that would prevent the use of felonies older than seven years to

disqualify a worker covered by the Maritime Transportation Security Act unless the felony was related to terrorism (as defined in the Homeland Security Act of 2002[1]). The Teamsters Union encourages the implementation of similar restrictions with regard to the hazardous materials background checks for commercial drivers.

Additionally, the Teamsters urge the reconsideration of the existing look-back periods. Currently, the Interim Final Rule provides for individuals to be disqualified for a period of seven years following a conviction for a disqualifying offense or for five years following release from incarceration for a disqualifying offense. It is clear that these time frames were adopted from the Maritime Transportation Security Act (MTSA), in an effort to allow for unity in the way in which transportation workers are treated. The Teamsters Union notes, however, that the USA PATRIOT Act gives the TSA greater discretion in determining the appropriate look-back period in relation to hazardous material endorsements than does the MTSA. As such, the TSA should exercise its discretion to impose shorter look-back periods under the USA PATRIOT Act and still allow for consistent requirements to be implemented under the MTSA. We urge the reconsideration of the five and seven year periods for disqualification.

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[1] *The term ''terrorism'' means any activity that—*
(A) involves an act that—
(i) is dangerous to human life or potentially destructive of critical infrastructure or key resources; and
(ii) is a violation of the criminal laws of the United States or of any State or other subdivision of the United States; and
(B) appears to be intended—
(i) to intimidate or coerce a civilian population;
(ii) to influence the policy of a government by intimidation or coercion; or
(iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping.

Conclusion:

The Teamsters Union appreciates the efforts made to balance the interests of increased security with the protection of drivers' rights. It is our hope that these efforts will continue and that the recommendations discussed above will be incorporated to further improve this balance.

With that, I thank you again for the opportunity to testify today. I'd be happy to answer any questions you may have.